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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1379

WALTER HUMPHREY, DONALD V. MALONE, ROBERT KALWAT and MARION A. SACKSTEDER, *Petitioners,*

v.

DEALERS TRANSPORT COMPANY

and

E & L TRANSPORT COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINIONS BELOW

The original opinion of the District Court of August 10, 1965, denying a Motion to Dismiss, is reported at 59 LRRM 3020, and is reprinted as App. A, pp. 1a-6a, *infra.* The opinion of the District Court of October 19, 1967, dismissing the complaint, is not reported;

it is reprinted as App. B, pp. 7a-14a, *infra*. The Court of Appeals wrote no opinion. Its order is unreported and is reprinted as App. C, p. 15a, *infra*.

JURISDICTION

The order of the Court of Appeals was entered on January 10, 1969. On April 1, 1969, Mr. Justice Stewart granted leave to file this petition on or before May 9, 1969. This Court has jurisdiction under 28 U.S.C. § 1254(1) .

QUESTIONS PRESENTED

1. Whether it is compatible with Section 301 of the Labor Management Relations Act, 1947, to deny recovery to victims of a breach of contract on the theory that they are required to establish that the injury would not have occurred but for the breach?

2. Whether non-performance of obligations affirmed in *Humphrey* v. *Moore*, 375 U.S. 335, is excused by the state court injunction, therein reversed, although the employer-obligor was not free of contributory fault?

STATUTE INVOLVED

This case involves the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 141, *et seq.* (hereinafter referred to as the "Act"), and particularly §§ 8(d) and 301(a) thereof, which provide in pertinent part as follows:

> Section 8(d) "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to

wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, * * *". 61 Stat. 140; 29 U.S.C. § 158(d))

Section 301(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (61 Stat. 156; 29 U.S.C. § 185)

STATEMENT OF THE CASE

Petitioners, the prevailing parties in *Humphrey* v. *Moore,* 375 U.S. 335, return to this Court to secure redress for violation of rights there declared. The underlying facts giving rise to the present action were fully described in this Court's opinion (id., at 336-341). Only a synopsis is necessary here.[1]

A. The Relevant Facts

Dealers Transport Co. and E & L Transport Co. were both engaged in transporting new automobiles from the Ford Motor Company plant in Louisville, Kentucky. When they were informed by Ford that there would be room for only one, Dealers and E & L entered into an arrangement whereby "E & L would

[1] The transcript of record in this Court in the prior litigation is also part of the present record. Facts relied on in this petition, but not stated in this Court's prior opinion, are also, of course, found in the record which was before the District Court at the time it entered its order dismissing the complaint and before the Court of Appeals in the Appendix to Plaintiffs-Appellants Brief below, cited herein as "App.".

sell to Dealers its 'secondary' authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities." (*Id.* at 336-337; see also App. 88a).

Both employers were parties to a collective bargaining agreement with the International Brotherhood of Teamsters covering a multi-employer, multi-local union, bargaining unit. Under Section 5 of that agreement, the obligation of Dealers to integrate or dovetail E & L's Louisville employees on its own Louisville seniority roster depended on whether Dealers would be deemed to have "absorbed" E & L's Louisville business (see *id.*, at 348).

In response to "inquiry from E & L," the Local Union President, Priddy, received information "from the company" which led him to understand "that the transaction between the companies involved no trades, sales or exchanges of properties but only a withdrawal of E & L at the direction of the Ford Motor Company." (*Id.* at 337, 348). Priddy "consequently advised the E & L employees that their situation was precarious" (*id.*); when they nonetheless filed a grievance, the Union advised the Dealers' employees that they had "nothing to worry about" (375 U.S. at 340), since, as the Union understood the circumstances, the E & L employees would have no rights under the contract.

Subsequently, when the Union discovered from the Federal Register that Dealers was acquiring E & L's operating authority and that other locations were in-

volved in the transaction,[2] Priddy decided that the matter was one for decision by the Joint Conference Committee. (*Id.* at 348). Before the Committee, Priddy, by now of the view that there was an absorption, supported petitioners. On or about October 18, 1961, the Committee entered an award in petitioners' favor, directing that E & L employees "be sandwiched in on master seniority boards using the presently constituted seniority lists and dates contained therein * * *" (*id.* at 339, App. 10a-11a).

Dealers' employees then brought the state court action which ultimately came here as *Humphrey* v. *Moore*. Their claim was that *the Union* had been guilty of fraud and breach of its duty of fair representation. Their complaint in this respect was predicated upon Priddy's assurances to the Dealers' employees that they had "nothing to worry about." (*Id.* at 340; Tr. Nos. 17 and 18, Oct. Term, 1963, pp. 3, 6). They sought and obtained temporary and permanent injunctions against implementation of the award. Dealers did not oppose the granting of these injunctions; indeed, when the case came to this Court, Dealers did not support the decision of the Joint Committee; it urged rather that the decision of the Joint Committee be discarded and the matter be submitted to arbitration (375 U.S. at 343, n. 3).

On January 6, 1964, this Court held that the Joint Committee's award in favor of petitioners was "final and binding upon the parties, just as the contract says

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[2] The Union became aware of the trade of operating authorities only as notices of ostensibly independent transfers appeared at intervals in the Federal Register, on August 9, August 30 and October 11, 1961 (App. pp. 71a-72a, 119a-120a; Exs. 2, 3, 4).

it is" (*id.* at 351) and reversed the injunction which had been entered by the Kentucky Court of Appeals.

During the period of over two years in which the state court injunctions were in effect, petitioners had been deprived of the employment to which they were entitled under the Joint Conference Committee award. They therefore brought the present Section 301 damage suit against both Dealers and E & L.

With respect to the joint liability of respondents, the complaint alleged:

> "Prior to October, 1961, defendants Dealers and E & L conspired to and did fraudulently conceal from plaintiffs' exclusive bargaining agent the agreement whereby E & L would sell to Dealers its 'secondary' authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities. The purpose and effect of the aforesaid fraudulent concealment, was to defeat and prevent plaintiffs' exercise and enjoyment of employment rights arising from and under Article 5 of the contract * * *". (App. p. 12a)

Both respondents were thus charged with breach of contract by deliberately concealing material facts from the Union, petitioners' agent. Dealers individually was charged, moreover, with breach by failure to implement the award during the period of the state court injunctions. Petitioners contended that the injunction did not excuse the breach because (1) respondents' fraudulent concealment was a contributory cause

of the injunction; (2) "Dealers instigated, supported and assisted its own employees to resist * * * the exercise and enjoyment of plaintiffs' rights pursuant to the decision" of the Joint Conference Committee; and (3) Dealers "acquiesced in and supported and failed to take steps legally open and available to it to set aside the injunction * * *" (App. 12a).

The predicate of petitioners' claim that respondents had fraudulently concealed facts material to the "absorption" issue, and that it was this concealment which evoked Moore's charge of fraud and bad faith against the Union, is stated in *Humphrey* v. *Moore:*

> "Priddy's early assurances to Dealers employees were not well founded, it is true; but Priddy was acting upon information then available to him, information received from the company which led him to think there was no trade or exchange involved, no 'absorption' which might bring § 5 into play." 375 U.S. at 348, see also, *id.* at 337.

Evidence subsequently uncovered by petitioners during the discovery proceedings below, and called to the District Court's attention in petitioners' objections to respondents' proposed findings, further supports the allegations of fraud. This evidence at the very least strongly suggests that during their negotiations in June, 1961, Dealers and E & L had agreed that Dealers would not integrate E & L's Louisville employees on Dealers' seniority list, but recognized that, under Joint Committee precedent, its obligation to integrate would turn on "whether or not anything would be considered as having been purchased" (App. pp. 83a-84a, 93a-94a, 97a, 109a) "so as to make it an absorption" (App. p. 109a). *Both* employers thereupon misrepresented *to the Union and to their employees* that there

had been "no trades, sales or exchanges of property, but only a withdrawal by E & L at the direction of the Ford Motor Company" (App. pp. 18a; 82a-86a; see 375 U.S. at 337). Petitioners' theory was that the purpose of these misrepresentations was to dissuade the E & L employees from claiming absorption rights under Articles V and to dissuade the Union from asserting such right.

Further, and contrary to the unsupported "finding" below (App. p. 33a), that "all of the facts were subsequently known and were timely presented to the Joint [Conference] Committee at Detroit,"[3] Dealers' representation to that Committee that only intangible property—i.e., operating authority of unascertainable value —was being transferred (App. pp. 83a-84a, 98a-99a, 102a, 106a-107a) was false and fraudulent. Moore's attack upon the Joint Committee's authority was grounded on Dealers' representation to the Committee that there was "no sale of tangible assets at" Louisville. 375 U.S. at 346. Discovery established that E & L had contracted to sell to Dealers at book value its stock in Auto Releasing Company of Louisville, a non-carrier corporation set up for the purpose of handling the release of Ford trucks from Louisville assembly plant to the Louisville carrier, and Dealers had contracted to sell to E & L at 125% of book value its stock in Auto Releasing Company

[3] The record in *Humphrey* v. *Moore* provides no support for this finding. The Chancery Court there found (App. p. 53a) that "*no contention is made that* the pertinent facts with respect to this proposed 'merger' or 'absorption' of routes were not truthfully disclosed to the committee," but this was only in response to the claim of Dealers' employees that *their* interests had not been fairly protected. It was solely in this context that this Court considered the matter. 375 U.S. 335, 350-351.

of Lorain (App. pp. 90a-92a, 122a, 128-129a). This transaction was an integral part of the exchange of territories. Since the stock of these companies had a fixed value, revelation of the interrelated stock sales would have doomed the thesis that there was no "absorption" because only operating authorities were being exchanged. The Releasing Company exchange did not appear in the Federal Register notices; *only those facts which had been published (and were thus known to the Union) were disclosed to the Committee.* Thus, the Companies compounded their initial concealment of information from the Union and from the employees with an attempt to mislead the tribunal which they had agreed to empower to determine whether there had been an "absorption."

While respondents disputed the characterization of fraud, they admitted that vital facts were deliberately withheld from the Union prior to the Joint Committee meeting in Detroit. Snipes (App. 87a) was the leading figure in the transaction on behalf of Dealers. On deposition, he replied to the question "Why didn't you tell them any more?" than had appeared in the Federal Register: "Why should I?" (App. p. 115a).

B. The Proceedings Below

Petitioners' complaint was filed January 20, 1964. Thereafter, both respondents filed motions to dismiss the complaint for failure to state a claim on which relief could be granted. The issues on these motions were fully briefed. On August 10, 1965, the District Court entered an order denying the motions to dismiss, in an opinion which is reprinted herein at pp. 1a-6a, *infra.*

Petitioners then commenced pre-trial discovery, taking depositions pursuant to Rule 30, F.R.C.P. At a pre-trial conference on March 1, 1966, the Court stated that the case would be tried at the October, 1966, term (App. pp. 29a-30a). On September 20, 1966, the Court wrote a letter to counsel, stating that because of recent illness it would be impossible for him to try any jury cases before the October, 1967, term and suggesting that trial by jury be waived.

On July 11, 1967, the Court ordered another pre-trial conference which was held on August 30, 1967 (App. p. 30a). No motion for decision on the merits by either party was before the Court. The Court, however, rendered an oral opinion and directed defendants to submit findings of fact and conclusions of law and tender judgment in accordance with that opinion within ten days. The Court granted plaintiffs ten days to respond or file objections to defendants' proposal. On September 1, the Court entered an order embodying the foregoing directions (App. pp. 21a-32a). Defendants submitted proposed findings of fact and conclusions of law and petitioners filed objections thereto. On October 19, 1967, the District Court entered an order adopting, in toto, the findings of fact and conclusions of law which had been tendered by defendants and dismissing the action (App. B, pp. 7a-14a, *infra*). On January 10, 1969, the Court of Appeals affirmed on the findings and conclusions which had been adopted by the District Court (App. C, p. 15a, *infra*).

The operative holdings proposed by respondents and adopted by the courts below are as follows:

> "Plaintiffs' contention that there would not have been an injunction nor any law suit had it not been for the antecedent fraud of the de-

fendants is a very speculative and tenuous theory that pyramids inference upon inference. If the Joint Committee decision was fair, as the Supreme Court has held, then surely all that took place afterwards cannot be blamed upon the alleged antecedent fraud." (App. B, p. 11a, *infra*).

"As a result, the plaintiffs were in no way misled by said fraud, they did not rely to their detriment on said statements, and any possible adverse effects said fraud could have had were cured by the full hearing that was held at Detroit and whose decision was found by the Supreme Court to be fair and equitable." (App. B, p. 13a, *infra*).

"The alleged antecedent fraud of the defendants was not responsible for the law suit that was filed by Dealers employees. It would be stretching the imagination to rule as a matter of law that but for said alleged fraud no law suits would have been filed." (App. B, p. 13a, *infra*).

"Even if plaintiffs' theories of fraud and misrepresentation were deemed actionable, this Court finds that as a matter of law no damages will lie for the period of delays during which the injunction of the Court of Appeals was in effect." (App. B, p. 14a, *infra*).

REASONS FOR GRANTING THE WRIT

I. BY REQUIRING VICTIMS OF BREACH OF CONTRACT TO PROVE THAT THEY WOULD NOT HAVE BEEN INJURED BUT FOR THE BREACH, THE DECISION BELOW DEBILITATES SECTION 301.

In dismissing plaintiffs' action before trial because it could not "rule as a matter of law that but for said alleged fraud no law suit would have been filed", the court below established a rule which rewards fraud by frustrating its victims, and thereby defeats the object of § 301(a)—to assure good faith performance

of contractual commitments, which is one of the central objectives of the national labor policy. See, *e.g.*, *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 454, 456-457; *Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 509.

The question whether the beneficiary of a collective bargaining agreement must establish that a particular injury would not have occurred but for the breach, is one of general importance in fashioning the substantive law of § 301; it is particularly significant in the present context where the breach consists of concealment of that which respondents were obliged to disclose, not only by the implied covenant of good faith and fair dealing which inheres in every contract,[4] but by the express provisions of §§ 8(a)(5) and 8(d) of the Act[5] which "are part of the federal law of labor agreements". *NLRB* v. *C & C Plywood Corp.,* 385 U.S. 421, 430. See also *Textile Workers* v. *Lincoln*

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[4] The common-law principle that a covenant of good faith and fair dealing inheres in every contract, applies with even greater force in the law of collective bargaining agreements. See *Local 1912, International Association of Machinists* v. *U. S. Potash Company,* 270 F.2d 496, 498 (C.A. 10), following 3 Williston, *Contracts,* (Rev. Ed. 1936), § 670; *United Steelworkers* v. *New Park Mining Company,* 273 F.2d 352, 356 (C.A. 10). For here, the parties' relationship is not wholly consensual; rather, each fulfills a role imposed upon it by statute in furtherance of a national policy whose objective is industrial peace. See *United Steelworkers* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 580; *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 550. Since neither party can perform its assigned task without knowledge of material facts, the duty to provide information is necessarily an element of the statutory duty to bargain.

[5] *NLRB* v. *Acme Industrial Corp.,* 385 U.S. 432, 435-436.

Mills, 353 U.S. at 454, 456-457; *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270, 279.[6]

While the question may be one of first impression under § 301, the problem is familiar elsewhere in the law, and the universal resolution is diametrically opposite to that of the courts below herein. The law imposes upon the wrongdoer—particularly where he has contravened a statutory policy—the burden of establishing that his wrong *could not have* contributed to the injury. As long ago as *The Pennsylvania,* 19 Wall. (86 U.S.) 125, this Court rejected the proposition that one cannot recover for a wrong unless he can establish that the injury would not have occurred if the wrong had not been committed.

> "Concluding, then, as we must, that the bark was in fault, it still remains to inquire whether the fault contributed to the collision, whether *in any degree* it was the cause of the vessels coming into a dangerous position. It must be conceded that *if it clearly appears the fault could have had nothing to do with the disaster,* it may be dismissed from consideration. The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, *it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary*

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[6] Thus, the answer to Snipes' question, "Why should I" (p. 9, *supra*), is, "The law commands it."

to enforce obedience to the mandate of the statute." (19 Wall. at 136, emphasis supplied).[7]

The same principle was applied to labor legislation at the last Term of this Court. *Wirtz* v. *Hotel Employees,* 391 U.S. 492, construed § 402(c) of the Labor-Management Reporting and Disclosure Act of 1959, which provides that a court can set aside an election for union officers only if the violation of § 401 "may have affected the outcome" of the election. The Court held that the effect of the violation was to establish a *prima facie* case that the violation "may have affected the outcome" within the meaning of § 402, but that this "effect may of course be met by evidence which supports a finding that the violation *did not affect the result.*" (*Id.* at 506-507, emphasis supplied). A conclusion that the outcome was *not* affected must rest on "tangible evidence," not mere "conjecture"

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[7] Here, the courts below said (App. 11 (a), *infra*), "Plaintiffs' contention that there would not have been an injunction nor any law suit had it not been for the antecedent fraud of the defendants is a very speculative and tenuous theory that pyramids inference upon inference." *The Pennsylvania* answers conclusively: "If it be said that this is speculation, it may be admitted; but this is a speculation rendered necessary by a certain fault of the bark." 19 Wall. at 137. So here, "speculation" whether Moore would have sued absent respondent's representations on which Priddy relied in advising the employees becomes necessary only because of the certain fault of defendants—their concealment of material facts from Priddy.

The Pennsylvania was followed in *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, the Court saying:

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Id.* at 265.

See also, *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U.S. 690, 697, text and note at n. 7.

(*Id.* at 508).[8] In view of the "difficulty of proving" that violations actually did affect the outcome, this construction was necessary "in order to avoid rendering the proposed 'remedy practically worthless'" (*Id.* at 506).

But *Hotel Employees, supra,* is far from the first case which has adapted the principle articulated in *The Pennsylvania* to the area of labor relations. Early in the administration of the National Labor Relations Act, Judge Learned Hand wrote:

> "We have assumed hitherto that the strike here in question was only for the purpose of enforcing the union's power to negotiate for all the men. That is not true; there had been a wage dispute, and, *the men's inability to get at the truth of the Elmira business was another cause.* It is of course possible that the parties might have split over wages, or over the Elmira plant, even if the respondent had negotiated with the Joint Board. But since the refusal was at least one cause of the strike, and was a tort—a 'subtraction'—it rested *upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune.* Since it cannot show that the negotiations, if undertaken, would have broken down, it cannot say that the loss of the men's jobs was due to a controversy which the act does not affect to regulate." *NLRB* v. *Remington Rand, Inc.,* 94 F. 2d 862, 872 (C.A. 2). (Emphasis supplied.)

By parity of reasoning, since, as the complaint in *Humphrey* v. *Moore* shows, p. 5, *supra,* Priddy's as-

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[8] Findings 8, 9, 10, 14, 15, and 17, adopted by the courts below (App. 10(a)-14(a)), embody precisely the kind of reasoning which this Court characterized in *Hotel Employees* (*id.* at 508), as "pure conjecture."

surances to the Dealers' employees were relied on in the bringing of that law suit, respondents "cannot say" that their misrepresentations to Priddy "could not" have been "a cause" of Moore's suit.

Even more closely in point is *Garment Workers* v. *Labor Board,* 366 U.S. 731, 737. In that case, an employer had entered into an exclusive recognition agreement with the Union in the belief that it possessed the requisite majority of employees. The Union argued that even though, as it subsequently developed, it represented only a minority, so that the exclusive recognition provision was illegal, the remainder of the agreement should be continued in force. This Court rejected the argument:

> "On the facts shown, the agreement must fail in its entirety. It was obtained under the erroneous claim of majority representation. *Perhaps the employer would not have entered into it if he had known the facts.*" (Emphasis supplied). *Id.* at 737.

So here, it is quite enough to establish liability that "perhaps" *Moore et al.* would not have brought suit if they "had known the facts" from the beginning.

In short, the law places upon the *wrongdoer* the burden of *proving,* by evidence, not speculation, that the injury *would have occurred* absent the illegal action; and that rule is particularly Apposite where, as in *The Pennsylvania,* "it is necessary to enforce obedience to the mandate of a statute". Indeed, the rule is indispensable where the statute commands disclosure. For if the violation is concealment, "a substantive inquiry after the fact cannot possibly suc-

ceed in accurately ascertaining retrospectively" what a person would have done if he had had certain information when he was entitled to it. Compare, *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 365, n. 18.[9] If parties to a collective bargaining agreement can escape liability for withholding information because the victim is unable to demonstrate what would have happened, had he but known, it would "place a premium on concealment * * * [and] jeopardize the salutary policies of [§ 301]." Cf. *Wolf* v. *Weinstein,* 372 U.S. 633, 654.

The decision below clearly warrants certiorari if only because it cripples the enforcement of § 301. But the problem is a more general one, and is indeed presently before this Court in the context of another statute which requires disclosure. In *Mills* v. *Electric Autolite Company,* No. 1133, Oct. Term 1968 (cert. granted, April 21, 1969, 37 U.S. L. Wk. 3399), this Court agreed to review a decision of the Seventh Circuit which held that minority stockholders were not entitled to any remedy for misrepresentations in a proxy statement authorizing a merger unless the misleading statements caused the voters to approve the merger. Compare *Wirtz* v. *Hotel Employees, supra.* Petitioners in *Mills* argue that to inject this speculative issue into the litigation is to frustrate the disclosure policy of the Securities and Exchange Act of 1934, 15 U.S.C. § 78, n (a). The present case presents a parallel question under § 301 of the Labor-Management Relations Act of 1947. Indeed, petitioners' case

[9] *Silver* was followed by *Greene* v. *United States,* 376 U.S. 149, 162 which held that the law is reluctant to condition "restitution on a retroactive determination" that the injury would have occurred even if the wrong had not been committed.

here is far stronger, for the Seventh Circuit in *Mills* at least accorded the plaintiffs a trial on the issue, and placed the burden of proof of non-causation on the defendant. To that extent, the decision below is clearly in conflict with the Seventh Circuit's decision in *Mills,* just as both decisions are in conflict with the philosophy of *The Pennsylvania.*

II. IN HOLDING THE INJUNCTION A BAR TO RECOVERY OF DAMAGES, THE DECISION BELOW DISTORTS THIS COURT'S PRIOR DECISION AND CONFLICTS WITH SETTLED PRINCIPLES OF CONTRACT LAW.

The award of the Joint Conference Committee directed Dealers to "sandwich" petitioners into the seniority list within thirty days. Dealers failed to do this, but the courts below held its failure excused by the Kentucky Court of Appeals' injunction against performance (App. 10(a), 13(a), 14(a), pars. 7, 15, 19, *infra*). This defense was sustained despite the allegations of the complaint that Dealers was not free of contributory fault with respect to the injunction because of its fraudulent concealment; because it instigated the employees to bring the action; and because it did not oppose the injunction in the *Moore* litigation. The lower courts accepted Dealers' argument that its only obligation throughout was one of "neutrality" (App. 10(a)-12(a), pars. 8, 10, 16, 17, *infra*), and interpreted this Court's decision in *Humphrey* v. *Moore* "as approving or certainly not condemning the position that Dealers took" (App. 12(a), par. 11, *infra*). The Court further held that the injunction excused the breach because "it was impossible for Dealers Transport to prevent the issuance of the injunction by the Kentucky Court of Appeals." (*Id.* p. 10(a), par. 8). This reasoning warrants review on two counts: (1) it misconceives this Court's prior decision

in this litigation, and (2) it conflicts with the holding of the Second Circuit in *Seedman* v. *Friedman,* 132 F. 2d 290 (C.A. 2).

Taking worst things first, the decision below is a paradoxical inversion of *Humphrey* v. *Moore.* This Court had no occasion there to approve or disapprove the action of Dealers, for the question there was only whether *the Union* was guilty of fraud or breach of *its* duty of fair representation, see 375 U.S. at 351.

The reasoning below also attributes to this Court's decision a plainly untenable proposition—namely, that a party who has agreed to submit the question of contract interpretation to "final and binding determination" (375 U.S. at 351) is entitled to take a "neutral" position on finality when that determination is attacked by a third party.[10] But, what is most serious about this phase of the decision below is that it gives *Humphrey* v. *Moore* only prospective application—the award of the Joint Committee becomes "final and binding" only after the date this Court said it was. We cannot believe that this Court intended to immunize Dealers, whose fault contributed to the state court injunction, from liability to petitioners, whose rights this Court held were infringed thereby.

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[10] Of course, petitioners do not accept the finding that Dealers' position was one of "neutrality." As noted earlier, Dealers in this Court sought, albeit in a sophisticated manner, to upset the award of the Joint Conference Committee. See 375 U.S. at 343, n. 3. Petitioners contend that taking a "neutral" position and failing affirmatively to oppose the injunction were independent breaches of the implied obligation of good faith and fair-dealing, see p. 12, *supra.*

Moreover, the complaint alleges that Dealers supported its employees in bringing the *Moore* action. The findings below, drafted by defendants, are entirely silent with respect to this allegation. The decision, of course, prevents proof of the allegation.

In this respect the decision below conflicts with established contract law as exemplified by the Second Circuit's decision in *Seedman* v. *Friedman,* 132 F. 2d 290 (C.A. 2):

> "The [District] Court, however, stressed the injunction as a supervening act making impossible the performance of the contract. There has been much discussion in this case of the rule that performance of a contract is excused where it is forbidden by a judicial order. We shall not, however, go into that problem further than to say that the rule is not applied where the fault of the party owing performance under the contract contributed to the order. A.L.I. Restatement, Contracts, § 458." *Id.* at 296.

Section 458 of the *Restatement of Contracts* reads:

> "A contractual duty * * * is discharged in the absence of circumstances showing either a contrary intention or *contributing fault* on the part of the person subject to the duty, where performance is subsequently prevented or prohibited * * *
>
> (b) by a judicial * * * order made with due authority by a judge * * * of any of the United States. (Emphasis supplied.)[11]

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[11] Comment 3 to § 458 (p. 854) reads as follows:

> "A contracts with B to sell and to deliver to him a specific automobile on a certain day, time being of the essence. C, by false allegations of ownership of the machine induces a court having jurisdiction to enjoin A from delivering the machine. In spite of diligent effort A is unable to secure dissolution of the injunction until it is too late to fulfill his contract with B. A's duty is discharged. If C had just grounds for obtaining the injunction, or *if A failed in diligent effort to secure its dissolution, A would not be discharged.*" (Emphasis supplied.)

The contributory fault rule is the balance which the law strikes between the interests of the promisor and the promisee where performance is made impossible by an injunction obtained by a third party. While the promisee is denied the fruits of his bargain where both parties are equally innocent, the promisor remains liable for non-performance of his contractual obligation where his fault contributes in any way to the court decree which made performance impossible.

The promisor must answer in damages because damages are the alternative to the prohibited performance, required to compensate the promisee for the loss of his bargain. Judicial prohibition of performance at the instance of a third party does not carry immunity against damages for non-performance where the prohibition is traceable to "defendants' own breach of duty to others." 6 *Corbin on Contracts,* § 1346, p. 430. The contributory fault rule thus prevents promisors from profiting through welcome intervention of third parties, as Dealers here benefited by retaining its own employees throughout the injunction period. It would frustrate the object of the rule and defeat its policy to entertain a plea that the obligor's contributory fault should be excused, as the courts below held, because intervention *might* have occurred anyway.

We fully recognize that principles developed in the common law of contracts are not necessarily carried over into § 301, because attention must also be paid to "the impact of the national labor policy." *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459, 470. But here, national labor policy only reinforces the common law obligation of the promisor. For, as we have noted earlier, performance of contract obligations fulfills an independent statutory objective—promotion of indus-

trial peace. The circumstances in which non-performance is excused should therefore be kept at a minimum.

Since any acts constituting contributory fault constitute independent breaches of the contract, imposition of liability furthers the policies of Section 301 by discouraging contract violations. "The equities in this case seem to favor the employees; it would be inequitable to require them to absorb pay losses ascribable to the [breach of contract] of the Company". Cf. *International U. of E.R. & M. Wkrs.* v. *N.L.R.B.*, 328 F. 2d 723, 727 (C.A. 3). The equities here particularly favor the employees, because Dealers was the moving party in the transaction with E & L and benefited by keeping its own employees. "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley* v. *Livingston*, 376 U.S. 543, 549.

CONCLUSION

The decision below eviscerates Section 301 by rejecting the established law of causation, which is grounded in recognition that immunization from liability on the basis of speculation or conjecture provides incentive to wrongdoing. Certiorari should be granted to concretize the obligation of federal courts under *Lincoln Mills*, to vitalize its promise of reliable contract enforcement, and to remedy the injury suf-

fered by the "victorious" petitioners in *Humphrey* v. *Moore.*

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